Filed 3/3/09 P. v. Anderson CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MARK ANTHONY ANDERSON, Defendant and Appellant.	B207280 (Los Angeles County Superior Ct. No. VA096799)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Affirmed.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Zee Rodriguez and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Mark Anthony Anderson appeals from the judgment entered following a jury trial in which he was convicted of second degree murder. Appellant contends the trial court erred by admitting evidence of threats appellant made to the victim less than a week before her death. We affirm.

FACTS

Appellant lived with Barbara Moore. At some point, Moore decided she wanted to break up with appellant. Moore's nephew, Craig McGaughey, saw appellant shove Moore to the ground at a party. Moore's upstairs neighbors and friends, Cassandra Heard and Calvin Robinson, heard shouting from Moore's apartment on June 4, 2006.[1] Robinson knocked on Moore's door, and appellant told him to go away. At Robinson's insistence, appellant opened the door. Moore fled from the apartment and drove to McGaughey's home. Moore told McGaughey and Adrienne Tabin that she wanted appellant to leave and asked for help in getting appellant out of her apartment. Moore was crying and "hysterical." She appeared to be frightened. Moore said appellant was crazy. She told them appellant pulled out a knife, stabbed the mattress all around her, and "said if she wasn't going to be with him, she wasn't -- she won't be with nobody, and he knows how to make her disappear if he wants her to disappear."

Moore's nephews moved appellant's possessions out of Moore's apartment on June 5. Moore stayed at McGaughey's home from June 4 onward. Between June 5 and June 10, appellant placed 135 telephone calls to Moore. He did not phone her after June 10.

---

[1] Unless otherwise noted, all subsequent date references pertain to 2006.

Moore was last seen alive on the afternoon of June 10. Moore spoke with Heard at about 2:00 p.m. Moore said she had picked up appellant and they were washing clothes together at a laundromat. Moore asked Heard not to tell McGaughey. McGaughey saw Moore driving appellant in her car as McGaughey left a taco stand sometime between 3:00 and 6:00 p.m. on June 10. Moore and McGaughey had a brief conversation. Moore said, "I'm about to go drop him off at home. Did you get my tacos? I'll meet you at the house." McGaughey never again spoke to Moore or saw her alive.

At about 9:00 p.m. on June 10, appellant arrived at his mother and stepfather's home in a black BMW. Appellant's stepfather had not previously seen appellant with that car. Appellant asked to park the car in his stepfather's garage, although two cars were already parked in the garage. Appellant instead parked the BMW in an unlit area. Appellant's stepfather added that it was unusual for appellant to visit their home.

Heard phoned Moore on June 11, but her calls went unanswered. McGaughey and Tabin checked Moore's home, but neither she nor her car was there. At about 5:30 p.m. on June 11, a man noticed a foul odor emanating from Moore's black BMW, which was parked in an alley. On June 12, the police discovered Moore's body in the trunk of her car. The interior of the car was stained by blood, and it appeared that bleach and fabric softener had been poured into the vehicle. Moore had $30 in one pocket and some cocaine base in another pocket. McGaughey and Tabin saw a photograph of Moore's car on television and called the police. Police later examined the mattress in Moore's apartment and found "puncture wounds" in it. The police arrested appellant in Denver in September.

Lenora Thomas testified that about 17 years earlier, appellant went to jail as a result of an act of domestic violence against her. When they separated, appellant told her that if he could not have her, no one would. He threatened to kill her. Upon his release from jail, appellant came to her home and stabbed her in the back with a knife.

The jury convicted appellant of first degree murder. Because the jury had not been instructed upon degree, the court and counsel agreed the verdict should be modified to

reflect second degree murder. Appellant admitted he had previously been convicted of four serious or violent felony convictions within the scope of the Three Strikes Law and Penal Code section 667, subdivision (a)(1). The court sentenced appellant to a third strike term of 45 years to life in prison, plus 10 years for two Penal Code section 667, subdivision (a)(1) enhancements.

DISCUSSION

Over appellant's hearsay objection, the court permitted McGaughey to testify that on June 4 or 5, Moore told him appellant "said if she wasn't going to be with him, she wasn't -- she won't be with nobody, and he knows how to make her disappear if he wants her to disappear." Appellant contends the trial court erred by permitting McGaughey to testify regarding the threat because it was inadmissible hearsay.[2]

An out-of-court statement offered to prove the truth of the matter stated therein constitutes hearsay and is inadmissible absent an applicable exception. (Evid. Code, § 1200.)[3] We review any ruling on the admissibility of evidence for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

McGaughey's testimony regarding the threat presented two levels of hearsay: appellant's statement to Moore and Moore's repetition of that statement to McGaughey. Appellant concedes that his statement to Moore fell within the exception for party admissions. (§ 1220.) Alternatively, appellant's threatening statements would be admissible as reflecting his state of mind. (§ 1250.)

---

2 The trial court relied upon *People v. Giles* (2007) 40 Cal.4th 833, which broadly applied the forfeiture by wrongdoing exception to the Confrontation Clause. *Giles* was subsequently reversed by the United States Supreme Court in *Giles v. California* (2008) __ U.S. __ [128 S.Ct. 2678]. Appellant does not assert a confrontation clause violation, however.

3 Unless otherwise noted, all subsequent statutory references pertain to the Evidence Code.

Appellant argues, however, that Moore's statement to McGaughey did not fall within any recognized hearsay exception. Respondent argues section 1250 applies, in that "Moore's state of mind was at issue to show she was afraid of leaving, and of staying with, appellant. Given appellant's defense that Moore could not have truly been in fear of him since she was with him on June 10 … Moore's state of mind relative to her willingness to be with appellant was at issue. … Appellant himself placed Moore's state of mind in dispute because he argued her conduct relative to him was not that of a person in fear for her life."[4]

"Evidence of a statement of a declarant's state of mind, when offered to prove or explain the declarant's conduct, is admissible, as long as the statement was made under circumstances indicating its trustworthiness. (§§ 1250, subd. (a)(2), 1252.) A prerequisite to this exception is that the [declarant] victim's mental state or conduct be placed in issue. (*People v. Noguera* (1992) 4 Cal.4th 599, 621 [15 Cal.Rptr.2d 400, 842 P.2d 1160].) Evidence of the murder victim's fear of the defendant is admissible when the victim's state of mind is relevant to an element of an offense. (See, e.g., *People v. Waidla* [(2000) 22 Cal.4th 690] at p. 723 [victim's statements indicating fear of defendants were relevant to prove lack of consent in the burglary and robbery related to her murder." (*People v. Guerra, supra*, 37 Cal.4th at p. 1114 [finding victim's state of mind relevant to disprove consent in context of attempted rape felony murder theory and special circumstance allegation] overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76.) If the victim's conduct in conformity with his or her fear is not in dispute, statements reflecting the victim's state of mind are irrelevant. (*People v. Jablonski* (2006) 37 Cal.4th 774, 819; *Noguera, supra*, 4 Cal.4th at pp. 621-622.)

---

[4] Respondent does not cite any portion of the record in which appellant made such an argument or asserted such a defense, nor have we found any support for respondent's contention in the record.

The identity of Moore's killer was the chief issue in appellant's trial. The jury could reasonably infer from Moore's apparently voluntary companionship with appellant on June 10 that she did not fear him. Such an inference had an inherent tendency to diminish, however slightly, the inference that appellant was the person who killed Moore. Although appellant ultimately did not argue this theory, the prosecutor could reasonably anticipate prior to trial that he might do so and seek to counteract this inference by introducing evidence of the threats. Adopting such a view of the evidence, the trial court could reasonably conclude that Moore's state of mind was in dispute and that section 1250 applied. We cannot conclude this view was so arbitrary, capricious, or patently absurd as to constitute an abuse of discretion.

In any event, any error in admission of the evidence was harmless, given the strength of the remaining evidence showing appellant was the person who killed Moore. Moore was last seen in appellant's company. Her statements to McGaughey regarding the tacos, dropping appellant off, and meeting McGaughey at his home strongly implied she intended to go to McGaughey's home to eat tacos immediately after a quick trip to drop off appellant. Contrary to her stated intention, however, Moore never arrived at McGaughey's home. When appellant's stepfather saw appellant later that night, appellant was engaged in unusual behavior focused to a significant extent on a black BMW. Appellant seemingly wanted to keep the car out of sight, as he sought to park it in his stepfather's garage, then parked it in an unlit area. Given the similarity of description to Moore's car and the fact Moore had picked appellant up in her car earlier in the day, the jury could reasonably infer appellant drove Moore's car to his stepfather's home. Moore was never again seen driving her car, and her body was discovered in the trunk less than 48 hours later. Although no one else learned of Moore's death until her body was found on June 12, appellant's cessation of his frequent telephone calls to Moore after June 10 supported a strong inference he knew she was dead, which in turn supported an inference he killed her. Finally, appellant left the state, although the record does not reveal the date of his departure. Collectively, this evidence established an extremely strong inference

that appellant was the person who killed Moore. There is no reasonable probability appellant would have obtained a more favorable verdict if the trial court had excluded McGaughey's testimony regarding the threats. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Appellant further contends the threats were inadmissible under section 1101, subdivision (b). Appellant did not object on this ground in the trial court and therefore arguably forfeited it. We nonetheless briefly address the issue because the prosecutor and court discussed section 1101 with respect to the prosecutor's motion in limine to admit both the evidence of the Lenora Thomas threats and stabbing incident[5] and appellant's threats to Moore.

Section 1101, subdivision (a) prohibits admission of "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) … when offered to prove his or her conduct on a specified occasion." Subdivision (b) of section 1101 provides an exception: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

Assuming, for the sake of argument, that section 1101 applies to appellant's threats to Moore, the threats were relevant to show his motive for killing her, which tended to strengthen the inference that appellant was the person who killed her. The threats also tended to show his intent, and possibly a plan, to make Moore "disappear" so that she would not have a relationship with any other man. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 757 ["A defendant's threat against the victim, however, is relevant to prove intent in

---

5 Appellant does not challenge the admission of the evidence regarding Thomas.

a prosecution for murder."].) The threats were therefore relevant to prove something other than appellant's character and would fall within the exception provided by section 1101, subdivision (b).

In any event, as previously noted, the remaining evidence of appellant's identity as Moore's killer was extremely strong. Accordingly, even if we were to conclude the threat evidence was inadmissible pursuant to section 1101, subdivision (a), the error would be harmless, as it is not reasonably probable appellant would have obtained a more favorable result absent its admission.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

BAUER, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

---

*Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.